

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE LEGREER ALLEN,

Defendant-Appellant.

UNPUBLISHED

March 24, 2005

No. 252379

Wayne Circuit Court

LC No. 03-004964-01

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, two counts of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, 750.227b. Defendant was sentenced to thirty-one years and three months to sixty years in prison for the second-degree murder conviction, twenty-three years and nine months to fifty years in prison for each assault with intent to murder conviction, and two years in prison for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that the trial court erred in denying his motion for a directed verdict on the first-degree murder charge and the prosecution failed to present sufficient evidence to support his second-degree murder conviction. We disagree.

A review of a trial court's ruling on a directed verdict motion mandates this Court review the evidence up to the point the motion is made. *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). Because review of a trial court's ruling on a directed verdict is similar to an insufficiency of the evidence claim, this Court's review is de novo. On review, this Court must determine whether viewing the evidence in a light most favorable to the prosecution, a rational trier of fact, could find that the prosecution proved all of the essential elements of the crime beyond a reasonable doubt. *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003).

To prove first-degree premeditated murder, the prosecution must show: 1) defendant intentionally killed the victim and 2) the act of killing was deliberate and premeditated. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). The element of premeditation requires sufficient time for a defendant to take a second look at his actions. *Id.* Deliberation and premeditation may be inferred from the facts and circumstances surrounding the killing. *Id.* Because the jury cannot read a defendant's mind, minimal circumstantial evidence is sufficient to prove a defendant's state of mind. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417

(2001). Factors that may be considered to judge premeditation include: 1) the relationship between the parties, 2) the defendant's actions before and after the crime, and 3) the circumstances of the killing itself, including the weapon used. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Where the evidence establishes a fight and then a killing, there must be a showing of a thought process which is not disturbed by hot blood. *Id.* at 301. To establish premeditation and deliberation, the prosecution must show the existence of some time between the initial homicidal intent and the ultimate action. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). The interval should be long enough to afford a reasonable person time to take a second look. *Id.* at 641.

According to the record before us, defendant and his intended victim had a tumultuous relationship, whereby defendant was pistol-whipped by his intended victim on one occasion. In addition, the intended victim shot at defendant and his brother on another occasion. On the day of the fatal shooting, the intended victim was standing outside of his car at a gas station talking to some friends. Defendant pulled into the gas station in a green SUV with two other men. Defendant was seated in the back seat of the vehicle. A witness noticed defendant lean forward toward his brother and noticed his brother pass defendant a handgun. The testimony then revealed that defendant exited the SUV and walked toward the gas station building. Defendant saw the intended victim "eye to eye," pulled the handgun from his waistband, and began firing in the intended victim's direction. As defendant was shooting, he began retreating to the green SUV. Defendant fired four or five shots, jumped in the SUV, and left the scene. Defendant was admittedly angry that the intended victim had "gotten the better of [him]" on two previous occasions. From the testimony gleaned from the record, a reasonable jury could find that defendant had sufficient time to plan and reconsider his actions. There was sufficient evidence present to show that defendant's actions were premeditated and deliberate. Therefore, the trial court properly denied defendant's motion for a directed verdict.

There was also sufficient evidence present to convict defendant of second-degree murder. The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is defined as the intent to kill, intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id.* at 464.

Evidence was presented that defendant was upset that the intended victim had gotten the better of him on two previous occasions. There was also evidence presented that defendant's brother passed defendant the handgun after the SUV pulled into the gas station. Defendant exited the SUV and walked toward the gas station building. When defendant saw the intended victim "eye to eye" he pulled the handgun from his waistband and began firing in the intended victim's direction. Defendant contends that he had an honest and reasonable fear that the intended victim presented a real and immediate threat to his life and safety. *People v Daniels*, 192 Mich App 658, 672; 482 NW2d 176 (1991). However, it is not within the province of this Court to interfere with the factfinder's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992). As indicated in the record, defendant exited his vehicle and approached Bradley. Therefore, self-defense cannot be claimed where defendant was the initial aggressor. A reasonable jury could

conclude that defendant was not firing the weapon in self-defense, but rather, fired the weapon maliciously without justification or excuse.

Defendant's second issue on appeal is that the prosecution failed to present sufficient evidence to support both of his assault with intent to murder convictions. Additionally, defendant argues that when the jury found defendant not guilty of first degree murder and guilty of assault with intent to murder, the jury rendered inconsistent verdicts. Defendant argues that once defendant was found not guilty of first degree murder, he must by necessity, be found not guilty of assault with intent to murder because in order to prove the latter, the State must prove that the defendant had an actual intent to kill. We disagree with defendant's analysis because embodied within the elements of second degree murder, is an intent to kill.

The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. The intent to kill may be proved by inference from any facts in evidence. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). Under the doctrine of transferred intent, the prosecution has to show that defendant had the requisite state of mind to kill, not that his state of mind was directed at the victims of the charged assaults. As this Court explained in *People v Abraham*, 256 Mich App 265, 270; 662 NW2d 836 (2003), the general intent to kill need not be directed at an identified individual or the eventual victim.

When reviewing the record to determine if there was sufficient evidence to support defendant's conviction for assault with intent to murder, we review the facts in a light most favorable to the prosecution. Our review of the record demonstrates that defendant was seen in a green SUV at the gas station moments before the shooting. A witness also noticed a weapon passed from the front seat of the vehicle to defendant. Defendant walked toward the gas station building, noticed the intended victim, pulled a gun from his waistband, and began firing in the intended victim's direction. Decedent and her friend, the second assault victim, were standing outside of a vehicle located directly between defendant and the intended victim. When defendant began shooting, decedent's friend pushed decedent away and jumped in the vehicle. Decedent was struck with one of the bullets defendant shot in the intended victim's direction. After the SUV left the scene, decedent's friend got out of the vehicle and decedent told her that she had been shot.

Sufficient evidence was present to show that defendant had the intention to kill the intended victim. Merely because he shot the wrong person makes his crime no less heinous. It is only necessary that the state of mind exist, not that it be directed at a particular person. *Lawton, supra* at 351. In *Lawton* this Court held that the defendant may have intended to assault one individual, however his ignorance of the presence of others made his crime no less heinous. *Lawton, supra* at 351.

In this case, defendant's intent to assault the intended victim was sufficient to establish an assault with intent to murder decedent's friend. A reasonable jury could infer defendant intended to kill the intended victim when he discharged the handgun in his direction. His ignorance of the presence of decedent and her friend makes his crime no less heinous. Therefore, a reasonable

juror could find defendant guilty of assault with intent to commit murder beyond a reasonable doubt, as to both the intended victim and decedent's friend.

We also disagree with defendant that convictions of second degree murder and assault with intent to murder produce inconsistent verdicts. The elements of second degree murder are: (1) death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id.* at 464. Because the legal definition of malice encompasses an intent to kill, defendant is legally incorrect in his assertion that second degree murder does not include an intent to kill. Because second degree murder and assault with intent to commit murder have a common element, an intent to kill, defendant's argument is without merit. Therefore, we hold that convictions for both crimes do not lead to inconsistent jury verdicts.

Defendant contends that the trial court erred when it failed to instruct the jury on assault with intent to murder regarding decedent's friend. However, the record indicates that, after the trial court read the jury instructions to the jury, defense counsel stated his satisfaction with the jury instructions read. This constitutes a waiver of appellate review. One who waives his right under a rule may not then seek appellate review of a claimed deprivation of these rights, as the waiver has extinguished any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Even so, a review of the record indicates that the trial court's instruction on assault with intent to murder, regarding the intended victim, implied the instruction regarding decedent's friend under the doctrine of transferred intent. The trial court instructed: "in order to find defendant guilty of assault with intent to murder the jury must find that defendant intended to kill [the intended victim]." This instruction was correct, in that the jury did have to find that fact in order to convict defendant under the doctrine of transferred intent regarding decedent's friend. Therefore, defendant's contention is without merit.

Defendant's next issue on appeal is that the trial court erred when it reprimanded defense counsel and inappropriately questioned defendant. Because defendant did not object at trial these issues are unpreserved and accordingly the defendant must show that plain error occurred which affected his substantial rights. This Court should only reverse a ruling if it seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity. In addition, conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial manner or tone. A judge should avoid interruptions of counsel in their arguments except to clarify in his mind their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment. *People v Conyers*, 194 Mich App 395, 397; 487 NW2d 787 (1992). In addition, a trial court may question a witness in order to clarify testimony or elicit additional relevant information. *Id.* at 404. The court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. A trial court may not assume the prosecutor's role with advantages unavailable to the prosecution. *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). The test is

whether the judge's questions and comments may have unjustifiably aroused suspicion in the jury's mind about a witness's credibility or whether the judge's partiality may have influenced the jury to the detriment of the defendant's case. *Conyers, supra* at 405.

The trial court made the following comments to defense counsel:

“Mr. Cook [defense counsel], do you want Mr. Cripps [codefendant's defense counsel] to go first and maybe get organized cause you're taking a real long time between questions and I don't know if you're thrown off by her testimony. You had all lunch to prepare for cross examination and you act like you're so surprised by what's going on right now. Do you need more time to collect your thoughts?”

The trial court also instructed defense counsel on the proper way to use the preliminary examination transcript to cross-examine a witness. When defense counsel failed to comply, the trial court commented on this failure and asked defense counsel if there was a “problem.” Defendant contends that the trial court disparaged defense counsel in front of the jury and suggested that defense counsel was unorganized, ill prepared, and ignorant of the proper trial procedures, and that this denied him a fair trial. However, it is apparent from the record that the trial court was attempting to avoid any waste of time by instructing defense counsel on the proper way to impeach a witness with prior testimony. Otherwise, defense counsel would have improperly attempted to impeach the witness, further delaying the cross-examination process. The trial court was seemingly offering defense counsel more time to prepare his cross-examination because of the lengthy delay in questions asked the witness. Therefore, we conclude that the trial court's comments did not amount to error resulting in the miscarriage of justice.

We do find error in the trial court's examination of defendant. Following defendant's direct testimony and cross-examination, the trial court asked defendant a series of questions. Defendant contends that the trial court was acting as a second prosecutor when it effectively impeached defendant's trial testimony. While we do not share defendant's characterization of the trial court's questioning of defendant, we do find that the trial court went beyond attempting to clarify defendant's testimony and came perilously close to cross-examination of the defendant. While we are not unmindful of the fact that the remarks of a trial court judge weigh heavy in the minds of jurors, *People v King*, 384 Mich 310, 315; 181 NW2d 916 (1970), we cannot conclude from the record any indication that the trial court's questioning of defendant influenced the jury to the detriment of defendant's case. Furthermore, defendant has failed to demonstrate that any purported error was outcome determinative. The record indicates that several witnesses identified defendant as the shooter. A witness testified that he observed defendant obtain a gun from his brother. Defendant admitted that he had a weapon and shot the weapon at intended victim on the day of the incident. Therefore, the trial court's questioning was not so erroneous that it would have affected the outcome of the trial.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello